Supreme Court, U. S.
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No. 75-1825

In the Supreme Court of the United States

OCTOBER TERM, 1976

WADE H. LITTRELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner challenges the sufficiency and admissibility of evidence in his trial for filing a false income tax return and false statement of financial condition with the Internal Revenue Service.

After a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted of willfully filing a false income tax return for 1969 in which he knowingly understated his gross income by $57,500, in violation of 26 U.S.C. 7206(1); and willfully filing with the Internal Revenue Service a false statement of financial condition, in violation of 26 U.S.C. 7206(1) (Tr. 13-14).[1] The court sentenced petitioner to one-year concurrent prison terms (Tr. 309).

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[1]"Tr." refers to the transcript of trial proceedings.

The pertinent facts are as follows: Petitioner, a travelling salesman, reported on his 1969 income tax return that he had received gross commission income of $60,000 from his employers, a group of corporations owned and operated by Angelo DiSpirto (Tr. 171, 175; Govt. Ex. 2). However, by means of testimony and documentary evidence, the government proved that petitioner's actual gross commission income for 1969 was $117,500 (Pet. App. A 4). The evidence further showed that petitioner owned 4,000 shares of the common stock of AVTEC Corporation on May 3, 1971, and failed to disclose it on a Statement of Financial Condition filed with the Internal Revenue Service on that date (Tr. 17; Govt. Ex. 25).

1. Petitioner contends (Pet. 11) that he did not file the 1969 tax return in question. But it was stipulated that on June 12, 1970, petitioner signed that return (Govt. Ex. 2) in the office of his accountant who prepared it and that the Internal Revenue Service received it on June 17, 1970 (Tr. 17). Although petitioner did not personally mail the return, that fact is of no consequence. The jury was amply justified in concluding that petitioner's signing of the return signaled his intention that the return should be mailed to the Internal Revenue Service, for it was due to be filed five days later, and had been prepared by the accountant from information furnished him by petitioner (Tr. 255). When the accountant or his employee mailed the return, they were acting on behalf of petitioner and within the scope of their authority.

2. Petitioner further contends (Pet. 11-12) that the evidence was insufficient because certain of the checks claimed by the government to represent commission income to petitioner were in fact given to him by the corporations for the payment of certain corporate expenses. In support of this argument, petitioner relies upon

his testimony that under his contract with DiSpirto he was required to pay certain corporate expenses out of the funds he received from the corporations (Tr. 181-187).

The government proved that petitioner had received in execss of $100,000 in sales commissions (Tr. 25-33, 38-41, 51-52). The jury was instructed that the government had the burden of proving its case beyond a reasonable doubt (Tr. 292), and that it was the petitioner's contention that the total funds received from the corporations during the year 1969 included amounts that, as required by the corporations, were used to pay corporate expenses and, therefore, were not chargeable as gross income to him (Tr. 297). As the court of appeals correctly noted (Pet. App. A 3-A 4),[2] petitioner's defense that all of the funds received were not gross income because a portion of the funds were for the payment of corporate expenses involved a question of credibility. The jury was not required to believe that the checks in question were paid to petitioner for this purpose and, by its verdict, resolved this question against the petitioner.

3. Petitioner also argues (Pet. 12-13) that the trial court erred in admitting into evidence Government Exhibit 6, a $5,000 commission check, because petitioner did not personally endorse it. But this check was endorsed for

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[2]The court of appeals was satisfied with the sufficiency of the evidence, stating (Pet. App. A 4):

> Without detailing the testimony as to Count 1, suffice it to say that there was testimony believed by the jury that Littrell had gross income for the year 1969 of $117,500. Bank or savings and loan deposits to his account totalling $107,500 were shown. An exhibit listing his 1969 income given by defendant to an IRS agent indicated he had $100,000 of gross income for 1969. If believed, the evidence clearly showed gross income many thousands of dollars in excess of the $60,000 set forth on the 1040 form. The evidence was clearly sufficient to submit Count 1 to the jury.

deposit by petitioner's wife and deposited to their joint checking account (Tr. 32, 185; Govt. Ex. 6). The jury could thereby readily infer that petitioner had knowledge of the check, despite the fact that he did not endorse it personally.[3]

4. Finally, petitioner contends (Pet. 16) that his conviction for filing a false statement of financial condition (Form 433-AB) cannot stand without the testimony of the revenue officer, which he claims is not worthy of belief. But the jury resolved the question of the credibility of the witness against petitioner and that is the end of the matter. And the fact that the revenue officer stated that the filing of a statement of financial condition

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[3]Petitioner also argues (Pet. 14-15) that three checks (Govt. Exs. 10, 12 and 16 [should be 13] were improperly admitted in evidence because the corporate books to authenticate them were unavailable. However, there was no need for such authentication. First, it was stipulated that the endorsements on all checks introduced into evidence were those of petitioner, with the exception of the $5,000 check (Govt. Ex. 6) deposited by his wife (Tr. 18-19). Second, it was stipulated that these same three checks were all made payable to petitioner and were in fact endorsed by him (Tr. 19, 21). Moreover, petitioner admitted during the investigation that his gross commissions for 1969 were $100,000, $40,000 in excess of the amount reported on the tax return (Tr. 90-92, 93; Govt. Ex. 26).

There is likewise no merit to petitioner's contention (Pet. 13-14) that the district court erred in admitting into evidence Government Exhibits 8 and 9, which were photocopies of two commission checks, because the backs of the checks were not photographed. These checks are shown on the corporate books to be commissions paid to petitioner (Tr. 29-32, 232) and they were payable to him. Moreover, petitioner admitted during the investigation that those checks constituted commissions paid to him (Govt. Ex. 29; Tr. 121, 124).

is a "routine" matter in the tax collection process does not excuse petitioner's submission of a false statement.[4]

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[4]The Fifth Circuit has recently held that the filing of a false Form 433-AB could not be prosecuted under 26 U.S.C. 7206(1) because that form was not one which was required to be filed by the Code or regulations. *United States* v. *Levy*, 533 F. 2d 969 (C.A. 5). Although we believe that decision is erroneous, there is no reason for review of petitioner's conviction because he has not raised the question whether Section 7206(1) encompasses the filing of a false Form 433-AB. Moreover, the prison sentences imposed on the two counts are concurrent and no fines were imposed. Therefore, even if Section 7206 (1) could not be applied to the filing of a false Form 433-AB, the validity of the sentence on petitioner's conviction for filing a false income tax return would not be affected. *Benton* v. *Maryland*, 395 U.S. 784, 791; *Barnes* v. *United States*, 412 U.S. 837, 848 and n. 16.

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